APPENDIX A

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER ON REVIEW,

*v.*

CALIFORNIA EASTERN LINE, INC., RESPONDENT ON REVIEW

MOTION TO REMAND TO THE TAX COURT WITH INSTRUCTIONS TO THAT COURT TO VACATE ITS DECISION AND DISMISS THE PETITION

Comes now the Petitioner on review and moves the Court to remand this case to the Tax Court of the United States with instructions to the Tax Court to vacate its decision and opinion and to dismiss the petition for the reason that the Tax Court of the United States lacked jurisdiction because of the failure of the Respondent on review to substitute the Secretary of Commerce for the Chairman of the United States Maritime Commission as required by the Reorganization Act of 1949 and Reorganization Plan No. 21, of 1950.

Respectfully submitted,

s/ HOLMES BALDRIDGE,
*Assistant Attorney General.*
EDWARD H. HICKEY,
FREDERICK N. CURLEY,
JAMES H. PRENTICE,
*Attorneys, Department of Justice.*

United States Court of Appeals for the District of Columbia Circuit. Filed July 18, 1952. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER,

*v.*

CALIFORNIA EASTERN LINE, INC., RESPONDENT

MOTION TO DISMISS PETITION FOR REVIEW

Comes now the respondent and moves the Court to dismiss the petition for review on the ground that the Court lacks jurisdiction to review or redetermine any of the errors alleged to have been committed by the Tax Court, as set forth in the petition for review, none of which involves a constitutional or jurisdictional question.

Respondent submits the annexed memorandum in support of its motion.

Respectfully submitted,

CLETUS KEATING,
HAROLD B. FINN,
s/ ROBERT E. KLINE JR.,
*Attorneys for Respondent,*
*Munsey Building,*
*Washington 4, D. C.*

United States Court of Appeals for the District of Columbia Circuit. Filed August 25, 1952. Joseph W. Stewart, Clerk.

Receipt of copy of above motion and attached memorandum acknowledged this 25th day of August, 1952. (S.) Frederick N. Curley, Attorney for Petitioner.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 OCTOBER TERM, 1952

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

*v.*

CALIFORNIA EASTERN LINE, INC., RESPONDENT

Before: CLARK, PRETTYMAN and WASHINGTON, Circuit Judges, in Chambers.

ORDER

It is ORDERED by the Court that petitioner herein show cause within 15 days why this case should not be dismissed for lack of jurisdiction on the part of this Court. See United States v. Siegel, 83 U.S. App. D.C. 88, 168 F. 2d 143 (1948); Davis v. Preston, 280 U.S. 406, 408 (1930); Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631, 638 (1949); Snyder v. Buck, 340 U.S. 15, 20 (1950). Respondent may file a reply within 15 days after petitioner's answer is filed.

Dated: December 4, 1952.

Per Curiam.

United States Court of Appeals for the District of Columbia Circuit. Filed December 4, 1952. Joseph W. Stewart, Clerk.

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

*v.*

CALIFORNIA EASTERN LINE, INC., RESPONDENT

ON MOTION OF PETITIONER TO REMAND TO THE TAX COURT OF THE UNITED STATES WITH INSTRUCTIONS TO VACATE DECISION AND DISMISS PETITION FOR REVIEW

Decided April 16, 1953

United States Court of Appeals for the District of Columbia Circuit. Filed April 16, 1953. Joseph W. Stewart, Clerk.

*Messrs. Frederick N. Curley* and *Edward H. Hickey*, Attorneys, Department of Justice, for petitioner.

*Messrs. Harold B. Finn, pro hac vice*, by special leave of Court, and *Robert E. Kline, Jr.* for respondent.

*Mr. Joseph P. Tumulty, Jr.* for Viking Corporation, *amicus curiae*, filed a memorandum urging that petitioner's motion be denied.

Before: CLARK, PRETTYMAN and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is a renego-

tiation case, in which a motion was made by Government counsel to remand the cause to the Tax Court of the United States with instructions to vacate its decision. The ground of the motion was that the position of the Government official named as respondent in the Tax Court proceeding has been abolished and the cause has abated for want of substitution of the successor to his functions.

In 1949, the Chairman of the United States Maritime Commission determined that the California Eastern Line, Inc., had made excessive profits in 1942 under an allegedly renegotiable contract. California Eastern thereupon petitioned the Tax Court for a redetermination under the Renegotiation Act, as amended, 50 U.S.C.A. App. §1191, naming the Chairman of the Maritime Commission as respondent. A hearing was held in the Tax Court in March 1951 on the question whether the contract in issue was subject to the Renegotiation Act. The Tax Court held, in February 1952, that the contract was not a renegotiable contract within the meaning of Section 403 (c)(1) of the Act. 17 T.C. 1325 (1952). On April 25, 1952, a petition for review addressed to this court was filed by Government counsel with the clerk of the Tax Court. The case was docketed in this court on June 3, 1952. On July 18, 1952, the instant motion was filed by counsel for the Government.

I

The moving papers rely on the fact that under Reorganization Plan No. 21 of 1950, which became

effective May 24, 1950, the United States Maritime Commission and the Office of its Chairman were abolished, and those functions of the Commission and of its Chairman which are relevant here were transferred to the Secretary of Commerce. 64 Stat. 1273; 46 U.S.C.A. App. §1111. The Plan was adopted pursuant to the provisions of the Reorganization Act of 1949, 5 U.S.C.A. §133z, *et seq.*, which included the following provision in Section 9:

> "No suit, action, or other proceeding lawfully commenced by or against the head of any agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of the taking effect of any reorganization plan under the provisions of sections 133z to 133z-15 of this title, but the court may, on motion or supplemental petition filed at any time within twelve months after such reorganization plan takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, allow the same to be maintained by or against the successor of such head or officer under the reorganization effected by such plan, or, if there be no such successor, against such agency or officer as the President shall designate." June 20, 1949, c. 226, Title I, §9, 63 Stat. 206; 5 U.S.C.A. §133z-7(b).

Counsel for the Government argues that since California Eastern did not file a motion or supplemental petition in the Tax Court within the twelve-month period following May 24, 1950, requesting that the action survive against the Secretary of Commerce, the cause abated and the Tax Court was without jurisdiction to render its decision.

In support of its motion, the Government urges that an appellate court can and should prevent a lower court from disregarding the principles of abatement. It contends that if a judgment has been rendered which does not give proper effect to the abatement of the cause, the appellate court should exercise its supervisory jurisdiction to require the outstanding judgment to be vacated, while on the other hand if the lower court has properly abated an action, the appellate court should allow the judgment of abatement to stand. The decisions go far toward establishing these general propositions.[1] In any event we think we must consider whether there is now outstanding an invalid judgment in an abated cause, which should be prevented "from spawning any legal consequences." *United States* v. *Munsingwear, Inc.*, *supra* note 1, 340 U.S. at 41 (1950).

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[1] *United States* v. *Seigel*, 83 U.S. App. D.C. 88, 168 F. 2d 143 (1948); *Davis* v. *Preston*, 280 U.S. 406 (1930); *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U.S. 631 (1949); *Snyder* v. *Buck*, 340 U.S. 15, 20-21 (1950); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950); and *McGrath* v. *National Association of Manufacturers*, 344 U.S. 804 (1952).

We turn, then, to the statute on which the Government relies. The Reorganization Act of 1949, in the provision above-quoted relative to abatement, speaks of a "suit, action, or other proceeding." This must mean a suit, action, or proceeding before a court, for the second clause of the provision says "the court" may allow survival. The statute's primary purpose was evidently to ameliorate the harsh consequences of the common-law abatement rules usually applicable to judicial procedings.[2] Any effect it has in causing termination of a "suit, action, or other proceeding" would appear to be secondary. Administrative proceedings, as far as we can discover, have never been held to be subject to the common-law rules of abatement. In principle they should not be, and a statute should not be interpreted as making them so subject unless the legislative intent clearly so requires. Changes in the personnel or organization of the executive branch should not be permitted, without good purpose, to delay or hinder the citizen in his dealings with any part of it.

The renegotiation proceedings had in this case were wholly administrative in nature. There could be no judicial review until after the Tax Court rendered its decision. The proceeding in the Tax

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[2] *Cf.* Defense Supplies Corp. v. Lawrence Warehouse Co., *supra*, 336 U.S. at 636-37: "The statute states categorically that 'no action shall abate' . . . If Congress states that no action shall abate, we fail to see why we should make additional language a proviso." See also Snyder v. Buck, *supra*, 340 U.S. at 19.

Court was not an adversary action: it did not require judgment against some person or agency. Rather its goal was a redetermination, following the initial executive determination, of the amount by which the contractor's profits were excessive. 50 U.S.C.A. App. § 1191(e)(1). Neither was the Tax Court proceeding a review: It is to "be treated as a proceeding de novo." *Ibid.* In such cases, the head of the agency alleging excessive profits is named as respondent, under the rules of the Tax Court. But he is named by title as an impersonal officer, not as an individual person.[3] Throughout the proceedings, whether the matter is before the primary agency or before the Tax Court, the citizen is still seeking or resisting an executive determination; the matter is still in the bosom of the executive branch. In the words of the governing statute, the Tax Court is "an independent agency in the Executive Branch of the Government," which "shall be known as The Tax Court. . . ." 26 U.S.C.A. § 1100. It has been

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[3] Rule 64-II, 26 U.S.C.A. fol. § 1111. In tax cases Rule 12 of the Tax Court requires that a copy of the petition be served upon "the Commissioner." No person is named by name. The proceeding does not abate if a Commissioner leaves office or dies. *Cf.* Rusk v. Commissioner of Internal Revenue, 53 F.2d 428 (7th Cir. 1931); 26 U.S.C.A. § 1143. Rule 64 of the Tax Court provides that in renegotiation cases the same rules apply and that when the rules say "Commissioner" they shall refer to "the Board" or "the Secretary" as used in the Renegotiation Act. It further provides that in renegotiation proceedings "the Board" or "the Secretary . . . shall be shown as the respondent."

consistently held to be not a court, but "an executive or administrative board."[4]

In renegotiation proceedings before the Tax Court, the doctrines of abatement and substitution applicable to judicial proceedings are not in our view required for the protection either of the citizen or of the Government. On the Government's side, it is the national treasury which, in any event, will ultimately gain or lose as against the citizen. And the hazard that the proper Government official may not be named as respondent under the rules of the Tax Court presents no serious difficulty. In the instant case, no affirmative relief was asked against the Chairman of the Maritime Commission in the Tax Court proceedings; the Tax Court was simply to review his order and redetermine the matters there involved. Abatement on the ground that the Chairman was no longer in office or his office no longer in existence would not bear any relation to the realities of the situation, and would defeat the ends of justice. We would not willingly reach that result unless required to do so by legislation or proper administrative rule. In the present case we find no such statutory or administrative requirement. Accordingly we deny the Government's motion to remand the cause to the Tax Court with directions to vacate its judgment.

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[4] *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U.S. 716, 725 (1929); *Rusk v. Commissioner of Internal Revenue*, 53 F.2d 428 (7th Cir. 1931).

II

After argument of the Government's motion, we raised on our own initiative—and asked the parties to brief—a further jurisdictional question, based on the following facts: The petition to this court, filed on April 25, 1952, was captioned "Chairman of the United States Maritime Commission, Petitioner for Review vs. California Eastern Line, Inc., Respondent-Appellee." The petition begins by saying: "The United States of America hereby respectfully petitions for review of the Decision of the Tax Court of the United States. . . . This review is sought by the United States of America." Nothing in the petition advised this court that there was no Chairman of the United States Maritime Commission then in office, or that the functions of the Chairman had long since been transferred to the Secretary of Commerce. It was not until July 18, 1952, when the motion to remand was filed by Government counsel, that this court was advised of the facts. The Secretary of Commerce has not appeared, or sought to appear, in the cause.

On these facts, the question presented is one of jurisdiction over the parties. We hold in this case that the provisions of Section 9 of the Reorganization Act concerning abatement are inapplicable to proceedings in the Tax Court in which an agency or officer later affected by a reorganization plan is named as respondent. The same must be said of the corollary substitution provisions of that sec-

tion. The status of the present proceedings in this court is therefore not governed by the parties' failure to comply with those substitution provisions.[5] The question, rather, is whether we now have before us a justiciable controversy, between proper parties. We start with the judgment of the Tax Court validly entered insofar as any problem of abatement and substitution is concerned. Was either the "Chairman of the U. S. Maritime Commission" or the "United States of America" entitled to challenge that judgment in the courts?

The statute provides that the Tax Court shall "finally determine" the amount of excessive profits in renegotiation proceedings, and that its decision shall not be reviewable. 50 U.S.C.A. App. § 1191(e)(1). But we have held that an administrative agency cannot finally determine the extent of its own jurisdiction, and hence that judgments of the Tax Court in renegotiation cases may be examined in this court to determine whether juris-

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[5] *Cf.* Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631 (1949), in which it was held that an appellate court had no jurisdiction to review a cause on the merits where the respondent "called for review after the period given for substitution [of a Government official] had expired." 336 U.S. at 638. But in that case the statutory provisions for abatement and substitution were applicable to the proceedings in the tribunal below. The provisions of Section 9 are not applicable to the *judicial* proceedings in this case, begun after the judgment of the Tax Court was rendered and after Reorganization Plan No. 21 became fully effective. The only actions to which Section 9 applies would appear to be those "lawfully commenced by or against" a Government official who is later stripped of his relevant functions, or otherwise affected, by a reorganization plan.

dictional or constitutional limits have been exceeded.[6] Our review takes place pursuant to Section 1141 of Title 26 of the United States Code, the general statute governing review of Tax Court decisions. In a tax case brought under that section, "the Commissioner" (of Internal Revenue) may petition for judicial review, 26 U.S.C.A. § 1142, and if the office changes hands while such a case is pending before the Tax Court or an appellate court, no substitution occurs or is required.[7] In renegotiation cases, the statute is not specific on these points. Cf. *U.S. Electrical Motors* v. *Jones*, 80 U.S. App. D.C. at 332, 153 F. 2d at 137. But the statute does say, 50 U.S.C.A. App. § 1191(e)(1), that in renegotiation cases the Tax Court shall have the same "powers and duties," in respect of the parties, as it has under the Internal Revenue Code provisions governing Tax Court procedure.[8] We think it clear that procedure in tax and renegotiation cases in the Tax Court is intended to be

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[6] *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Board*, 90 U.S. App. D.C. 218, 195 F.2d 198 (1952); *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 89 U.S. App. D.C. 281, 192 F.2d 405 (1951); *U.S. Electrical Motors* v. *Jones*, 80 U.S. App. D.C. 329, 153 F.2d 134 (1946).

[7] See fn. 3, *supra*. 26 U.S.C.A. § 1143 provides that "When the incumbent of the office of Commissioner changes, no substitution of the name of his successor shall be required in proceedings pending . . . before any appellate court reviewing the action of the Tax Court."

[8] Including the section giving the Tax Court power to make rules of practice and procedure, 26 U.S.C.A. § 1111. "Commissioner," of course, is broadly defined in renegotiation cases. See note 3, supra.

as nearly as possible the same. A like principle should be aplied to proceedings in this court.

Neither statute nor Tax Court rule makes specific provision for the problem arising if the office of "Commissioner" is abolished.[9] The statutory provision negating any requirement of substitution deals rather with the problem arising "when the incumbent of the office of Commissioner changes." But the policy of preserving the continuity of litigation in the one case points to a like result in the other. Under this view, a petition filed here in the name of the Chairman of the Maritime Commission should be held sufficient to warrant our review, even though the office has been abolished and the former incumbent has become a private citizen. We need not, however, go so far.

The petition here stated in its text that it was brought on behalf of the United States. We think that fact should be given effect. The United States, in its fiscal aspect, was the true opponent of the claims of the contractor before the administrative agency: it did not need to intervene in the proceeding before the Tax Court, for the governing statute had in substance placed it there. Congress had authorized the Tax Court to give relief to an

[9] Compare Reorganization Plan No. 26 of 1950, effective July 31, 1950, 15 Fed. Reg. 4935, 64 Stat. 1280, which transfers all functions of the Commissioner of Internal Revenue to the Secretary of the Treasury. The latter is empowered to authorize the performance of those functions by any other officer, agency, or employee of the Department of the Treasury. The office of Commissioner is not abolished, but its powers are subject to diminution.

aggrieved contractor, and had not deemed it necessary to say specifically that the United States or anyone else should be named as defendant. The Tax Court by its rules created the requirement that a respondent be expressly named—but even so (as we have seen) it required that an officer of the United States be named, in his capacity as an official and not in his individual capacity. For reasons akin, therefore, to those which led us to hold that the proceeding in the Tax Court did not abate, we hold that the petition for review filed in the name of the United States was sufficient to invoke our jurisdiction.[10]

At the same time, we think this proceeding should not continue further without the appearance before us of the official who has succeeded to the powers and functions of the Chairman of the Maritime Commission. Proper exercise of the powers of this court, as well as full protection of the interests of the taxpayer, makes the appearance here of the Secretary of Commerce as a party to this cause desirable if not necessary.[11] The

[10] Our decision in United States v. Seigel, 83 U.S. App. D.C. 88, 168 F.2d 143 (1948), does not dictate otherwise. There, we held that "one who is not a party to a record and judgment is not entitled to appeal therefrom." 83 U.S. App. D.C. at 89, 168 F.2d at 144. But the present proceeding is not an appeal—it is an original judicial proceeding, commenced by petition, to review the decision of an administrative body. The Seigel case therefore seems to us inapplicable here.

[11] *Compare* Land v. Dollar, 88 U.S. App. D.C. 162, 188 F.2d 629 (1951), cert. denied 340 U.S. 948 (1951); Land v. Dollar, 88 U.S. App. D.C. 311, 190 F.2d 366 (1951); Land v. Dollar, 89 U.S. App. D.C. 38, 190 F.2d 623 (1951); s.c. 344 U.S. 806 (1952).

Secretary of Commerce will be given twenty days within which to move to join himself as a party, and to move to correct the caption of the cause. If he fails to do so, we will entertain a motion to dismiss the proceeding.

III

The California Eastern Line has filed a motion to dismiss the Government's petition on the ground that this court lacks jurisdiction by reason of the nature of the question presented, contending it is not one of those which this court will review under the doctrine of *U.S. Electrical Motors* v. *Jones, supra.* We defer decision on that motion, as it deals with the substance of the petition for review. The case will be set down for hearing on the merits after the briefs have been filed.

*So ordered.*

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 APRIL TERM, 1953

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

*v.*

CALIFORNIA EASTERN LINE, INC., RESPONDENT

Before CLARK, PRETTYMAN and WASHINGTON, Circuit Judges.

ORDER

The above-entitled case came on to be heard on the motion of petitioner to remand the case to the

Tax Court of the United States with instructions to vacate the decision on review herein and to dismiss the petition for review, and was argued by counsel.

On consideration whereof, it is ORDERED by the Court that, for the reasons indicated in the opinion this day filed herein, the said motion of petitioner be, and it is hereby, denied.

It is further ORDERED by the Court that the Secretary of Commerce of the United States be, and he is hereby, allowed to and including May 6, 1953, within which to move in this Court in the above-entitled case to join himself as a party therein and to move to correct the caption of the case.

It is further ORDERED by the Court that this case be set down for hearing on the merits after the briefs have been filed.

Dated: April 16, 1953. Per Curiam.

United States Court of Appeals for the District of Columbia Circuit. Filed April 16, 1953. Joseph W. Stewart, Clerk.

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

*v.*

CALIFORNIA EASTERN LINE, INC., RESPONDENT

MOTION TO JOIN AS PETITIONER AND CORRECT CAPTION

United States Court of Appeals for the District of Columbia Circuit. Filed May 5, 1953. Joseph W. Stewart, Clerk.

Comes now Sinclair Weeks, Secretary of Commerce, by his attorney of record, and moves the Court that he be joined as petitioner in the above-entitled proceeding and that the caption of this proceeding be corrected to read "Sinclair Weeks, Secretary of Commerce, Chairman of the United States Maritime Commission; Petitioners v. California Eastern Line, Inc., Respondent."

Reorganization Plan No. 21 of 1950 was effective May 24, 1950 (64 Stat. 1273; 46 U.S.C.A. App. 1111). This plan abolished the United States Maritime Commission including the offices of the members of the Commission and the Chairman thereof and transferred all of the functions of the United States Maritime Commission and of the Chairman of the United States Maritime Commis-

sion pertinent hereto to the Secretary of Commerce. Reorganization Plan No. 21 of 1950, *supra*, was promulgated under the authority of Reorganization Act of 1949 (63 Stat. 206; 5 U.S.C.A. 133z et seq.). It is believed that the proper exercise of the powers of this Court as well as the full protection of the interest of all parties concerned, makes the appearance here, of Sinclair Weeks, Secretary of Commerce as a party to this proceeding desirable and necessary (see opinion of this Court dated April 16, 1953).

Respectfully submitted,

WARREN E. BURGER,
*Assistant Attorney General,*
EDWARD H. HICKEY,
*Attorney,*
FREDERICK N. CURLEY,
*Attorney,*
JAMES H. PRENTICE,
*Attorney,*
*Department of Justice.*

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 APRIL TERM, 1953

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

*v.*

CALIFORNIA EASTERN LINE, INC., RESPONDENT

Before CLARK, PRETTYMAN and WASHINGTON, Circuit Judges, in Chambers.

## ORDER

United States Court of Appeals for the District of Columbia Circuit. Filed May 28, 1953. Joseph W. Stewart, Clerk.

Upon consideration of the motion of Sinclair Weeks, Secretary of Commerce, that he be joined as petitioner in the above-entitled case and to correct the caption of this case in conformity with the opinion of this Court entered herein April 16, 1953, and of respondent's objections thereto, it is

ORDERED by the Court that the motion of Sinclair Weeks, Secretary of Commerce, be granted and that the caption of this case be, and it is hereby, changed to read as follows:

> "The United States of America and The Secretary of Commerce, as Successor to the Chairman of the United States Maritime Com-

mission, Petitioners, v. California Eastern Line, Inc., Respondent."

Dated: May 28, 1953.

Per Curiam.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

*v.*

CALIFORNIA EASTERN LINE, INC., RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

Decided January 21, 1954

United States Court of Appeals for the District of Columbia Circuit. Filed January 21, 1954. Joseph W. Stewart, Clerk.

*Mr. Frederick N. Curley*, Attorney, Department of Justice, with whom *Mr. Edward H. Hickey*, Attorney, Department of Justice, was on the brief, for petitioners.

*Mr. Harold B. Finn, pro hac vice*, by special leave of Court, with whom *Mr. Robert E. Kline, Jr.*, was on the brief, for respondent.

Before CLARK, PRETTYMAN and WASHINGTON, Circuit Judges.

PRETTYMAN, *Circuit Judge*: This is a petition to review a decision of the Tax Court of the United States in a renegotiation case. California Eastern Line, Inc., respondent here, was the owner of the American steamship "Vermont". In 1941 it entered into a written contract signed by the British Ministry of War Transport as the other party. Under the contract the vessel was used to transport cargo from New York to Sudan, in the Red Sea range. Respondent company received payment for the service. In 1949 the Chairman of the Maritime Commission entered an order determining that the company had realized excessive profits under the contract and proposing to renegotiate the contract. Thereafter he determined that the company had derived $164,000 of such profits within the meaning of the Renegotiation Act.[1] The company appealed to the Tax Court of the United States, which made extensive and detailed findings of fact and rendered an exhaustive opinion. It found as a fact that "The charter of the Vermont was neither a contract with the Commission or with any other department named in the Renegotiation Act, nor a subcontract under such a contract."[2]

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[1] 56 STAT. 245 (1942), as amended, 50 U.S.C.A. App. § 1191.

[2] 17 T.C. 1325 (1952).

The Renegotiation Act[3] empowers renegotiation of "the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor." The statute defines the word "Department" thus:[4]

> "The term 'Department' means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively."

Upon the basis of its findings of fact, as above indicated, and these provisions of the statute, the Tax Court determined: " * * * we have been unable to conclude that this contract is covered by the statute." It ordered and decided that "there is no renegotiable contract within Section 403(c)(1) of the Renegotiation Act." The present petition for review followed.[5]

The first question is whether this court has jurisdiction to review the decision of the Tax Court in this matter. The statute[6] provides that the Tax

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[3] 56 STAT. 983 (1942), as amended, 50 U.S.C.A. App. § 1191 (c) (1).

[4] 57 STAT. 348 (1943), as amended, 50 U.S.C.A. App. § 1191 (a) (1).

[5] After the filing of the petition Government counsel moved to remand to the Tax Court. This motion was denied. Chairman of U. S. Maritime Comm'n v. California Eastern Line, 92 U.S. App. D.C. —, 204 F. 2d 398 (1953).

[6] 58 STAT. 86 (1944), 50 U.S.C.A. App. § 1191 (e) (1).

Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." This court has held several times that in renegotiation cases it can review decisions of the Tax Court in respect to jurisdictional and Constitutional questions only.[7]

In 1945 this court had before it a renegotiation case which was strikingly similar to this one.[8] The evidence in the present case is more extensive, but the basic facts, *i.e.*, the contract, the signatories, the performance, are identical in all material respects. The Waterman Steamship Corporation was the owner of steamships and chartered some of them by contract signed by the British Ministry of War Transport. The Maritime Commission proposed to renegotiate the profits realized by the company on those contracts. The company maintained that the contracts were with a foreign government and therefore not subject to renegotiation. The company forthwith brought a civil action in the District Court seeking an injunction or a declaratory judgment. The District Court

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[7] *E.g.*, U. S. Electrical Motors v. Jones, 80 U.S. App. D.C. 329, 153 F. 2d 134 (1946); Psaty & Fuhrman v. Stimson, 87 U.S. App. D.C. 47, 182 F. 2d 985 (1950); Lowell Wool By-Products Co. v. War C. P. A. Bd., 89 U.S. App. D.C. 281, 192 F. 2d 405 (1951); Knu-Vise, Inc. v. War Contracts Price Adjustment Bd., 90 U.S. App. D.C. 218, 195 F. 2d 198 (1951).

[8] Waterman S. S. Corporation v. Land, 80 U.S. App. D.C. 167, 151 F. 2d 292 (1945).

dismissed the action, on the ground that the company had not exhausted its administrative remedies. On appeal to this court the company argued as its first point that the charters were not charters with the Commission or with any department of the United States Government and that accordingly there was no statute which authorized their renegotiation. This court held that the question thus presented was jurisdictional and that, if there was no law compelling renegotiation of the contracts, the company was entitled to invoke the Declaratory Judgment Act. The court thereupon went into an extensive examination of the question as to whether the contract was a contract with the Commission or was a contract with a foreign government and concluded by remanding the case to the District Court for consideration of that one question. The Supreme Court granted *certiorari* and in the course of its opinion wrote as follows:

> "Just as in the *Myers* case [303 U.S. 41], the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by

> the Chairman's determination of excessive profits may have them redetermined in a 'de novo' proceeding before the Tax Court. Section 403(c)(1) of the Act provides that the Tax Court 'shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . .' Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act."[9]

The Court went on to say: "Whether it [the District Court] ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination." The Court reversed this court upon the ground that the company had not exhausted its administrative remedies.

It is argued to us that the long passage which

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[9] Macauley v. Waterman S. S. Corp., 327 U.S. 540, 544, 90 L.Ed. 839, 66 S.Ct. 712 (1946).

we have quoted was *dictum*. Whether it was or was not, we think we cannot disregard it. The problem now before us is precisely the problem involved in that discussion. The Court said without qualification that what are and what are not negotiable contracts is a question of coverage and a part of the determination of the amount of excessive profits, as to which the Tax Court has exclusive jurisdiction. According to that statement, which we apply as written, this court has no jurisdiction to review the decision of the Tax Court upon the question whether the contract in controversy was or was not renegotiable. We do not understand the Supreme Court to have foreclosed review if requirements of due process were allegedly violated, but we do not have that question before us.

We discussed the *Waterman* case briefly in *Lowell Wool By-Products Co.* v. *War C. P. A. Bd.*[10] and, in respect to the rule as we saw it, said:

> "We think that a question whether a certain contract is within those to be renegotiated is a question of coverage, but that a question whether the Board has any power whatever over a particular company, apart from the nature of its contracts, is a question of jurisdiction."

The Government argues that in a later case[11] the Supreme Court, discussing the *Waterman* case,

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[10] 89 U.S. App. D.C. 281, 283, 192 F. 2d 405, 407 (1951).

[11] Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 766, 91 L.Ed. 1796, 67 S. Ct. 1493 (1947).

said: "The Waterman Corporation had contracted directly with a government agency, the Maritime Commission." This sentence, says the Government, was a conclusive finding upon the point in dispute in the *Waterman* case and also in the case at bar. But we think the Supreme Court did not intend that this one sentence, in the midst of a discussion of the *Waterman* case for other purposes, should constitute a final and conclusive finding of fact in a case which was not then before the Court and as to which it had no record, and particularly where the Court had held that the Tax Court must make the initial finding of that precise fact.

It follows from the foregoing that this petition for review must be dismissed for lack of jurisdiction. If it were determined that the question of the renegotiability of this contract went to the jurisdiction of the Tax Court and thus could be reviewed by this court, we would have to review the rulings of the Tax Court upon the subsidiary questions which went to make up its ultimate conclusion that it had jurisdiction. In that event we would review those questions on the same basis as we would review the record of a District Court proceeding.[12] Those questions as to which the petitioners allege error have been argued to us. Petitioners complain of the refusal of the Tax

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[12] *Cf.* Sec. 1141 (a), Int. Rev. Code, 26 U.S.C.A. § 1141 (a); U. S. Electrical Motors v. Jones, 80 U.S. App. D.C. 329, 331, 153 F. 2d 134, 136 (1946).

Court to admit in evidence a document purporting to be an official statement on the part of the British government.[13] They also claim error on the part of the Tax Court in various conclusions surrounding the negotiation and execution of the contract in dispute and concerning transactions which occurred pursuant to the contract. Petitioners further say that the Tax Court erred in the inferences which it drew from the clauses of the contract. We do not reach these contentions, as we lack jurisdiction of the question to which they are subsidiary.

Petition dismissed.

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[13] We note that the Tax Court does seem to have taken a look at the British statement, and Judge Raum, who wrote the opinion, observed that even upon that basis the Government did not establish its point.

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 JANUARY TERM, 1954

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

*v.*

CALIFORNIA EASTERN LINE, INC., RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

Before: CLARK, PRETTYMAN, and WASHINGTON, Circuit Judges.

## JUDGMENT

United States Court of Appeals for the District of Columbia Circuit. Filed January 21, 1954. Joseph W. Stewart, Clerk.

This case came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for review in this case be, and the same is hereby, dismissed for lack of jurisdiction.

Dated: January 21, 1954.

Per Circuit Judge PRETTYMAN.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 JANUARY TERM, 1954

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR TO THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

*v.*

CALIFORNIA EASTERN LINE, INC., RESPONDENT

Before: CLARK, PRETTYMAN, and WASHINGTON, Circuit Judges, in Chambers.

ORDER

United States Court of Appeal for the District of Columbia Circuit. Filed February 23, 1954. Joseph W. Stewart, Clerk.

On consideration of the petitioners' motion for an extension of time within which to file petition for rehearing in banc herein, and it appearing that the said petition was lodged with the Clerk, and it further appearing that the respondent has not filed objections to this motion, it is

ORDERED by the Court that the motion be granted and that the Clerk be, and he is hereby, directed to file forthwith the aforesaid petitioners' petition for rehearing in banc.

Per Curiam.

Dated: February 23, 1954.

*DOCKET ENTRY OF FILING OF PETITION FOR REHEARING EN BANC*

"2-23-54 Per Curiam order directing Clerk to file forthwith petitioners' petition for rehearing in banc.

2-23-54 25 copies petitioners' petition for rehearing in banc.

2-23-54 Certificate of service of petitioners' petition for rehearing."

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,448 JANUARY TERM, 1954

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

*v.*

CALIFORNIA EASTERN LINE, INC., RESPONDENT

Before: STEPHENS, Chief Judge, and EDGERTON, CLARK, WILBUR K. MILLER, PRETTYMAN, BAZELON, FAHY, WASHINGTON, and DANAHER, Circuit Judges, in Chambers.

ORDER

United States Court of Appeals for the District of Columbia Circuit. Filed March 12, 1954. Joseph W. Stewart, Clerk.

Upon consideration of petitioners' petition for a rehearing in banc, and of respondent's answer thereto, it is

ORDERED by the Court that the aforesaid petition for a rehearing in banc be, and it is hereby, denied.

Per Curiam.

Dated: March 12, 1954.

Chief Judge STEPHENS did not participate in the foregoing order.

## SUPREME COURT OF THE UNITED STATES

No. ——— OCTOBER TERM, 1953

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONER

*vs.*

CALIFORNIA EASTERN LINE, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 9th, 1954.

(S.) EARL WARREN,
*Chief Justice of the United States.*

Dated this 29th day of May, 1954.

APPENDIX B

The Renegotiation Act of 1942, as amended (56 Stat. 245, as amended, 50 U. S. C. App. 1191, *et seq.*), provides in pertinent part:

Sec. 403 (a). For the purposes of this section—

(1) The term "Department" means the Department of the Army, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

* * * * *

(5) The term "subcontract" means—

* * * * *

(B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, * * *.

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Sec. 403 (c) * * *

(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) (B)) do not exceed $500,000 and under subcontracts described in subsection (a) (5) (B) do not exceed $25,000 for such fiscal year. If such fiscal year is a fractional part of twelve months, the $500,000 amount and the $25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph.

* * * * *

Sec. 403 (e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before The Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of di-

visions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. * * *

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a re-

determination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

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